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Supreme Court, U.S.
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No. 93-64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANO BI, individually and on behalf of the children of Rashid Kahn, and as representative of the Estate of Rashid Kahn, et al.,
Petitioners,

vs.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.; UNION CARBIDE EASTERN, INC.; ENSERCH CORPORATION; HUMPHREYS & GLASGOW CONSULTANTS PVT., LTD.; HUMPHREYS & GLASGOW, LTD.; EBASCO-HUMPHREYS & GLASGOW, INC.,
Respondents.

ABDUL WAHID, et al.,
Petitioners,

vs.

UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC., formerly known as Union Carbide Corp.; UNION CARBIDE OF INDIA, LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT UNION CARBIDE CHEMICALS AND PLASTICS COMPANY INC.'S BRIEF IN OPPOSITION

BUD G. HOLMAN*
LISA E. CLEARY
* *Counsel of Record*

KELLEY DRYE & WARREN
Attorneys for Respondent Union Carbide Chemicals and Plastics Company Inc.
101 Park Avenue
New York, New York 10178
(212) 808-7800

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Second Circuit Court of Appeals correctly ruled, pursuant to comity principles that govern the relationships among nations, that the federal and state courts of this country should defer to the judgment of a democratic foreign government that disputes arising from a mass tort occurring within that foreign government's own borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world?

2. Whether the Second Circuit Court of Appeals should have affirmed the judgment of the Honorable John F. Keenan dismissing the complaints or

remanded to the District Court with directions to remand the suits to the Texas state court where such an act would have been futile?

CORPORATE DISCLOSURE STATEMENT

Union Carbide Chemicals and Plastics Company Inc.'s ("Union Carbide") parent company is Union Carbide Corporation. Union Carbide Chemicals and Plastics Company Inc. (or corporations in which Union Carbide Chemicals and Plastics Company Inc. has an ownership interest) has less than 100% ownership interests in the following subsidiaries and affiliates that have issued shares to the public:

Name

GenEx

UCAR Emulsion Systems

Union Carbide Industrial Gases Inc.

UCAR Polimero y Quimicos C.A.

UCIA Argentina S.A.I.C.S.

UCIA Chile

UCIA Costa Rica

UCIA Peru

Union Carbide Canada Ltd.
Carbon Products

Union Carbide Commercial C.A.

Union Carbide France S.A.

Union Carbide Hellas S.A.

Union Carbide India Ltd.

Union Carbide Indonesia PT

Union Carbide InterAmerica

Union Italia S.p.A.

Union Carbide Korea Ltd.

Union Carbide Malaysia
Sdn. Bhd.

Union Carbide Navarra S.A.

Union Carbide Philippines Inc.

Union Carbide Singapore

Unisil S.p.A.

S.A. White Marlins

Union Carbide Chemicals & Plastics Company Inc. Joint Venture

Baker Cummins Dermatologicals Inc.

Union Carbide Corporation Joint Venture

UCAR Carbon Company Inc.

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COUNTERSTATEMENT OF THE CASE

1. The Nature of These Consolidated Cases

These are two tag-along actions to the 1984 MDL 626 Litigation ("MDL 626") previously consolidated for pre-trial proceedings before the District Court for the Southern District of New York. All of those actions, some 145 in number, were dismissed seven years ago on forum non conveniens grounds. See In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd as modified, 809 F.2d 195 (2d Cir.), cert. denied, 484 U.S. 871 (1987). As in MDL 626, the petitioners herein seek recovery for personal injuries, wrongful death and loss of property arising from the gas release from the Union Carbide India Limited ("UCIL") plant in Bhopal, India on the

night of December 2-3, 1984. (JA6746-47).[1]

This was not the first time the named plaintiffs in these actions had been before the District Court, seeking the same relief against, inter alia, Union Carbide. Petitioners have not disputed Union Carbide's contention below that they are the same plaintiffs who were previously before the District Court. (JA6745-46, 6070-6133).

2. The Course of Proceedings at the District Court Level

The first of the actions, short captioned Wahid v. Union Carbide (the "Wahid action"), was filed on October

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[1] References to "JA__" refer to designated pages of the Joint Appendix filed with the Second Circuit Court of Appeals, references to "A__" refer to designated pages of the Appendix filed with this Court, and references to "P__" refer to the Petition.

15, 1990, in Bexar County, Texas. (JA6745). The second action, short captioned Bi v. Union Carbide (the "Bi action"), was originally filed on October 19, 1990 in Jefferson County, Texas. (JA6746).

a. Petitioners' Repeated Request for Reconsideration of Their Remand Motion

Union Carbide has always contended that UCIL, Union Carbide Eastern, Inc. ("UCE") and the Enserch defendants[2] were fraudulently joined in order to defeat diversity and removal

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[2] The "Enserch defendants" include Enserch Corporation ("Enserch"), Ebasco-Humphreys & Glasgow, Inc. ("H&G-Texas"), Humphreys & Glasgow, Ltd. ("H&G-London"), and Humphreys & Glasgow Consultants, Pvt., Ltd. ("H&G-India") (collectively "Enserch defendants"). These four defendants were fraudulently joined by plaintiffs in the Bi action for the purpose of defeating the District Court's diversity and removal jurisdiction.

jurisdiction. Accordingly, on November 13, 1990, Union Carbide removed the Wahid and Bi actions to federal court. (JA6745-46).

By Orders dated December 5 and 7, 1990, Judge Joe J. Fisher dismissed the Enserch defendants from the Bi action. (JA6579-80, 6749). On December 7, 1990, plaintiffs moved to remand the Bi case. After full briefing and a January 2, 1991 hearing, Judge Fisher issued an Order denying remand (JA6749), and at the hearing, orally denied the Bi plaintiffs' motion for a new trial, reconsideration and reinstatement of these dismissals. (JA6749).

On January 30, 1991, the Judicial Panel on Multi-District Litigation issued an Order transferring the actions to the Southern District of New

York for pre-trial proceedings, and they were thereafter assigned to Judge Keenan. (JA6749). The Bi plaintiffs subsequently moved the District Court to reconsider Judge Fisher's dismissal of certain defendants and his denial of their remand motion. (JA6750). During an April 8, 1991 status conference, the District Court stated that it would not re-visit the remand issue. (JA6750).

Despite this oral order, the Bi plaintiffs attempted to resurrect the remand issue for the fourth time in their response to Union Carbide's motion to dismiss. The Bi plaintiffs cross-moved to remand and to "reconsider" Judge Fisher's Orders of dismissal of the Enserch defendants. (JA255-410).

Plaintiffs in Wahid had similarly moved to remand their action on

December 19, 1990.[3] That motion was fully briefed, but was not decided prior to the transfer of that action. (JA6749).

On June 20, 1991, the then counsel for the Wahid plaintiffs, acting responsibly, moved for a dismissal of their claims against UCIL (JA1106-08), acknowledging that the plaintiffs were "incorrect" in their earlier contention that UCIL "had done business in Texas and was subject to the liberal provisions of our long-arm statute." The dismissal of UCIL was, counsel for the Wahid plaintiffs wrote, a "responsible act." (JA6278-79). Counsel also stated that he "still

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[3] UCIL was the only other named defendant in the Wahid action. UCIL, UCE, UCC and the Enserch defendants were named as defendants in the Bi action.

d[id] not know to what extent" the Wahid plaintiffs had participated in MDL 626 but that he was "endeavoring to find out." (JA6279).

b. Union Carbide's Motion To Dismiss

On May 24, 1991, Union Carbide filed its motion to dismiss or, in the alternative, for summary judgment. (JA1109-1339, 6287-6686, 6725-64). Union Carbide's final ground for dismissal, among many, many others, was that plaintiffs and their attorneys lacked standing and authority to maintain these actions in light of the Supreme Court of India's rulings upholding the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 (the "Bhopal Act"), which gave the Union of India ("UOI") authority to represent all Indian claimants and exclusive

authority to settle on behalf of all. The Second Circuit chose to affirm the District Court's judgment of dismissal on this ground, without reaching any of the other clear grounds, to reach the same conclusion. (A10-11).

Following the motion to dismiss in the District Court, the Bi plaintiffs served a lengthy discovery request (the "demands") and requested an extension to the briefing schedule. (JA696-702). Union Carbide was compelled to move for a protective order when the Bi plaintiffs refused to withdraw these demands. (JA639-702). The Bi plaintiffs did not respond to that motion, thus waiving their right to seek this discovery.

In August, 1991, the Wahid plaintiffs filed a brief in opposition to the motion to dismiss. (JA525-75).

The Wahid plaintiffs offered an affidavit from an individual who was not a plaintiff, asserting that the Wahid plaintiffs had not participated in either the UOI's action in India or MDL 626. No Wahid plaintiff stepped forward to attest to these representations.[4] (JA576-77).

Subsequently, Union Carbide received a copy of another Bi motion for a further extension of time to substitute a promised affidavit for another. (JA250-54). The assertions in

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[4] The assertions of Ms. Laughlin, a Rice University anthropology student, were not based on firsthand knowledge and included claims -- such as the assertion of UCIL's presence in Texas (JA457) -- that are at odds with the position of plaintiffs' counsel in the Wahid action. (JA6278-79). The affidavits of Ms. Laughlin and Abdul Jabbar Khan were contradicted by Union Carbide below. (Contra P12).

this motion contradicted counsel's previous representation that the original affidavit was in transit from India. (JA251-53). On October 4, 1991, the Enserch defendants served a brief and affidavits in response to the Bi plaintiffs' cross-motion (JA6237-68), Union Carbide served its reply papers (JA6070-6122, 6123-6214) and set forth that most, if not all, of the Wahid and Bi plaintiffs had previously filed claims in MDL 626. (JA6123-33).

On February 18, 1992, the District Court granted Union Carbide's motion to dismiss, applied federal forum non conveniens law, held that the analysis and results of its 1986 opinion were still appropriate, refused to reconsider Judge Fisher's rulings and also denied the Wahid plaintiffs' motion to remand. (A9-19).

3. Disposition at the Second Circuit Court of Appeals

On January 26, 1993, the Second Circuit Court of Appeals ruled that it would defer to the statute of a democratic country to resolve disputes created by a disaster of mass proportions that occurred within that country. The court held that when a recognized democracy determines that the interests of the victims of a mass tort that occurred within its borders will be best served if the government exclusively represents the victims in courts around the world, it would not pass judgment on that determination, and would permit only the foreign government access to our courts to litigate those claims, subject of course to the standing requirements of our courts. As the court noted, such a

result is "especially compelling in a case such as this where almost all of the victims are Indian citizens." (A44). The court also determined that courts in our federal system must respect an act of a foreign country which purports to deprive the victims of a mass tort of standing to sue in our courts as a question of federal common law binding on state and federal courts alike. As the court stated, "[t]he considerations underlying this determination implicate the relationship between our nation and India and are uniquely federal in nature." (A45). The court continued, "permitting individual states to develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of foreign

relations." (A45-46). The court concluded that since the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding petitioners' lack of standing that the appellate court had reached, a remand would be "pointless." (A46).

4. Additional Facts Relevant to the Instant Petition

Petitioners ignore the fact that their claims were dismissed on forum non conveniens grounds in 1986, and then later, the UOI commenced suit in India against Union Carbide on their behalf. The UOI prosecuted the Bhopal litigation to its conclusion in India. Petitioners' claims were thereafter fully, fairly and finally resolved by the highest court in India.

Petitioners assert that the Indian proceedings were inadequate, without disputing the material facts concerning the Indian proceedings.[5] The Indian Parliament's promulgation of the Bhopal Act facilitated the UOI's prosecution of all Bhopal-related claims. (JA6583-84, 6754). Petitioners must also concede that the Bhopal Act gave the UOI the "exclusive right to" represent its citizens in all Bhopal-related claims, including the exclusive right to institute, withdraw or compromise such claims. (JA6585, 6754). Based on the Bhopal Act, the UOI has consistently maintained that it

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[5] Petitioners' counsel does not dispute that he had his chance to represent plaintiffs in India. No American attorneys ever participated in the litigation commenced in the Bhopal district court, although they could have made such an application to do so. (JA6589-91, 6734).

is the exclusive representative of all claimants. (A27).

Petitioners also cannot dispute that litigation proceeded intensely in India for almost two and a half years, with lengthy hearings, numerous applications and petitions before all levels of the Indian judiciary, commencing in the Bhopal district court.[6]

After lengthy briefing and months of oral argument by Union Carbide and the UOI on appeals, the Supreme Court of India on February 14, 1989 effectuated by Order, a settlement of

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[6] The High Court of Madhya Pradesh and the Supreme Court of India heard appeals on the matter. From September, 1986 to February, 1989, the litigation was conducted on behalf of the victims by the Attorney General of India and other highly competent Indian lawyers. (JA6755-59).

"all claims, rights, and liabilities related to and arising out of the Bhopal . . . disaster." (JA6592-93, 6758). Pursuant to that Order and an Order dated February 15, 1989 (JA6594-96), Union Carbide and UCIL agreed to pay $470 million to the Registrar of the Supreme Court of India (JA6758-59), and it was paid by Union Carbide and UCIL on or about February 24, 1989. (JA6597-99, 6759).

The Terms of Settlement set forth the details for the final disposition of the litigation and were incorporated into the February 15, 1989 Order. (JA6596, 6760-61). By Order dated May 4, 1989, the Supreme Court set forth the reasons that had persuaded it that the Settlement Orders issued in February, 1989 were "just and reasonable." (JA6604-13, 6761).

On December 22, 1989, following lengthy hearings (and after challenge by, among others, the claimants the UOI represented under the authority granted to it under the Bhopal Act), the Supreme Court issued an eighty-seven page judgment upholding the constitutional validity of the Bhopal Act. The Supreme Court confirmed the UOI's exclusive authority to compromise all claims made or that could be made against Union Carbide and UCIL arising from the Bhopal tragedy. (JA6615-84, 6761-63).

Thereafter, the Supreme Court entertained challenges to the settlement and on October 3, 1991, issued a judgment upholding the terms of the settlement, thus fully and

finally resolving all civil claims against Union Carbide and UCIL.[7]

All of the counsel who represented petitioners below have now withdrawn. (JA6269-73). Petitioners' alleged counsel has presented no evidence that the Indian nationals he purports to represent authorized either the substitution of counsel or the pursuit of this petition. In fact, the attorney pursuing this petition could not conduct the litigation below because he was suspended from the practice of law for professional misconduct, although it has become

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[7] As reported in the New York Times at D-7 (June 22, 1992), the UOI has now fixed compensation for the Bhopal claimants, and the UOI's seventeen (17) special courts set up to hear individual claims for relief have already addressed thousands of claims. Id. Distributions to claimants have now occurred.

clear that he was directing the course of that litigation behind the scenes. (JA1114).

SUMMARY OF ARGUMENT

The Second Circuit correctly ruled, pursuant to comity principles that govern the relationships among nations, that the federal and state courts of this country should defer to the judgment of the UOI, a democratic foreign government, that disputes arising from a mass tort occurring within that foreign government's own borders can be best resolved by according the foreign government exclusive standing to represent the victims of the disaster in the courts of the world. The petition should be denied because the Second Circuit's dismissal of the actions for lack of standing is in accordance with well-

settled authority of this Court respecting comity principles and the act of state doctrine. Moreover, the Second Circuit correctly decided the issue of petitioners' standing to bring suit in the first instance.

Nor does the petition present any issues of federal law which should be addressed by this Court. The court below applied sound, uniform principles of federal law to determine that these cases were properly removed to federal court and, thereafter, properly dismissed rather than remanded to state court. Moreover, there is no conflict among the courts with respect to the standards and burdens in fraudulent joinder removal cases. The lower courts properly decided the fraudulent joinder issue in favor of respondents and petitioners' arguments concerning

veil-piercing, alter ego and agency do not raise any issues concerning a conflict among the courts and do not concern an important question of state law. There is also no conflict among the federal courts concerning the futility exception recognized by this Court in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700 (1991), where, as the Second Circuit correctly determined here, the Texas state court would also be bound by the same rules of standing.

Finally, petitioners do not raise any question regarding the doctrine of forum non conveniens. The District Court properly determined that petitioners were estopped from raising the forum non conveniens issue, which had been fully and fairly litigated

under federal common law in MDL 626. This Court declined to grant certiorari at that time to review the Second Circuit's decision affirming the dismissal. Even assuming that the collateral estoppel doctrine did not bar re-litigation of the forum non conveniens issue, the petition does not raise an issue of federal law as the federal common law doctrine of forum non conveniens applies in a diversity case removed from state court.

ARGUMENT

POINT I

WELL-ESTABLISHED PRINCIPLES OF COMITY AND THE ACT OF STATE DOCTRINE DICTATE THAT UNITED STATES COURTS RESPECT THE UNION OF INDIA'S DECISIONS REGARDING STANDING

In dismissing petitioners' actions for lack of standing, the Second Circuit acted in accordance with well-settled authority of this Court

concerning comity principles and the act of state doctrine.[8] Petitioners

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[8] The Second Circuit was correct in deciding the issue of standing first. As this Court has stated, "standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). See also Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 117 (2d Cir. 1991)("it is necessary first to address the question of . . . standing . . . . Because standing is jurisdictional under Article III of the United States Constitution, it is a threshold issue in all cases since putative plaintiffs lacking standing are not entitled to have their claims litigated in federal court.") (citation omitted); Harris v. City of Zion, 927 F.2d 1401, 1404 (7th Cir. 1991).

There is no conflict among the circuits on the issue of whether in a removed case the court should address a plaintiff's remand motion first. (P35-39). The one decision cited in which the court addressed the remand motion first expressly

(continued...)

present no issue of federal law which should be addressed by this Court.

Our courts have long recognized the doctrine of comity, which has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another . . . ." Hilton v. Guyot, 159 U.S. 113, 164 (1895). United States courts do not interfere in the internal affairs of foreign states in cases where such involvement would have a negative impact on U.S. relations with a foreign country. Comity is thus invoked in cases where the acts of foreign countries are implicated, not as a matter of

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[8](...continued)
assumed the correctness of Walker v. Savell, 335 F.2d 536 (5th Cir. 1964), which held courts are free to determine other motions before addressing a remand motion.

obligation, but out of deference and mutual respect. Id.

This case presents the paradigm situation that requires application of comity principles. The Bhopal Act was promulgated by the legislative branch of a democratic foreign state, the UOI, in response to a mass tort occurring within its borders. It grants the UOI exclusive standing to represent its citizens in courts around the world. The highest court of India has upheld the validity of the Bhopal Act and the settlement made pursuant to the Act. (A37-38).[9] In reference to the courts

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[9] The Texas Uniform Foreign Money Judgment Act and cases concerning standing for collateral attack are irrelevant here. (P57-58). The Bhopal Act granted exclusive standing in this matter to the UOI. Petitioners therefore lack standing to invoke the Texas statute to collaterally challenge the

(continued...)

of India, the Second Circuit had earlier pronounced that "[i]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. Such an assumption would directly conflict with the principle of comity . . . ." Jhirad v. Ferrandina, 536 F.2d 478, 484-85 (2d Cir.), cert. denied, 429 U.S. 833 (1976). And, as the Second

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[9](...continued)
proceedings in India. Similarly, whether the Bhopal Act provides for all of the rights and benefits provided to members of a class in United States litigation is also irrelevant. No two judicial systems are alike in all respects. Comity compels deference and respect to those differences. See, e.g., Blanco v. Banco Indus. de Venezuela, S.A., Nos. 242, 92-7523, 1993 WL 196173, at *8 (2d Cir. Apr. 30, 1993); Sahagian v. U.S., 864 F.2d 509, 514 (7th Cir. 1988), cert. denied, 489 U.S. 1087 (1989).

Circuit later ruled with reference to this litigation, "[t]o grant the victims of the Bhopal disaster, most of whom are citizens of India, access to our courts when India has set up what it believes to be the most effective method of dealing with a difficult problem would frustrate India's efforts." (A41-42). Refusing to recognize and defer to the disposition of the issue of standing by the highest court in India would thus be an affront to the doctrine of comity.[10] See,

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[10] Petitioners argue the Second Circuit improperly applied the act of state doctrine rationale to this case. (P 53-56). None of the cases they cite however, involved a legislative act like the Bhopal Act, which was promulgated in the "public interest" to give effect to the interests of a foreign people in the wake of a tragedy which occurred in their country. The validity of that Act was upheld by their own Supreme Court.

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[10](...continued)
None of the exceptions cited by petitioners apply. The exception for acts which come to fruition outside the confines of a foreign state's territory does not apply because, as discussed above, all relevant events occurred in India. None of petitioners' authorities support their argument that the doctrine does not apply when a foreign government is the exclusive representative of its citizens. So too, the Sabbatino exception for transactions as to which there is a reasonable "degree of international consensus" (P55-56) has no application here. Petitioners fail to establish -- and could not establish -- that there is a reasonable degree of international consensus contrary to the view held by the Indian Supreme Court and our Second Circuit.

Indeed, the Second Circuit implicitly recognized that the UOI had attempted to deal with a problem of "mass proportions" (A41) never encountered before, and concluded that it would not pass judgment on the manner in which that problem has been resolved, because "it would disrupt our relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in

(continued...)

e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Cunard Steamship Co. v. Salen Reefer Servs. AB, 773 F.2d 452 (2d Cir. 1985); Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976); Jhirad v. Ferrandina, 536 F.2d 478; IIT v. Lam (In re Colorado Corp.), 531 F.2d 463 (10th Cir. 1976); British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869 (9th Cir. 1974).

Principles of comity are embodied in the act of state doctrine. As noted in Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 416, the "classic American statement of the act of state doctrine" is contained in Underhill v. Hernandez,

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[10](...continued)
the future." (A43).

168 U.S. 250, 252 (1897), where this Court held:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

See also United States v. Merit, 962 F.2d 917 (9th Cir. 1992); Vanity Fair Mills v. T. Eaton Co., 234 F.2d 633 (2d Cir.), cert. denied, 352 U.S. 871 (1956). These principles, enunciated in the Restatement (Third) of the Foreign Relations Law of the United States § 443 (1987), provide that courts will refrain from sitting in "judgment on other acts of a governmental character done by a

foreign state within its own territory and applicable there."

According deference to the acts of the UOI and the decisions of the Indian Supreme Court is consistent with the promotion of uniform federal policy on issues of international concern. As the Ninth Circuit has stated, "[t]o participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy." International Ass'n of Mach. and Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). The Second Circuit has also noted the importance of a uniform federal foreign policy in this regard, stating with regard to the instant cases, "permitting individual states to

develop rules to determine the Bhopal Act's effect on standing in their courts would frustrate the need for a uniform policy on matters of foreign relations." (A45-46).

POINT II

THE COURT BELOW CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL

Petitioners' rhetoric concerning the "sacred principle of federalism" and the "total anarchy . . . when it comes to multi-national corporations" (P19, 20; see also id. at 28-29, 47-48), ignores the fact that the courts below applied sound, uniform principles of federal law to find: (1) that this case belonged in federal court; and (2) that this case was properly dismissed rather than remanded to state court.

A. There Is No Conflict Regarding the Burdens in Fraudulent Joinder Cases

Petitioners recognize (P39-41) that the Fifth Circuit has found that there are two circumstances when a court will find fraudulent joinder.

> The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.

Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983), cert. denied, 464 U.S. 1039 (1984). See also East Texas Mack Sales, Inc. v. Northwest Acceptance Corp., 819 F.2d 116, 119 (5th Cir. 1987).

However, contrary to petitioners' assertions (P40-41), this Court's decision in Wilson v. Republic Iron &

Steel Co., 257 U.S. 92 (1921), is not inconsistent with the cases cited above. Indeed, Wilson merely addresses the procedure for challenging fraudulent joinder and not the standards or burdens necessary for making such a case. Id. at 97.

Further, the Second Circuit's finding in Norwalk v. Air-Way Electric Appliance Corporation, 87 F.2d 317, 320 (2d Cir. 1937), that "proof of fraud must be clear and convincing," does not conflict with the "no possibility" rule. Rather, it is indicative of the same exacting burden placed upon defendants in fraudulent joinder cases by the Fifth Circuit. Petitioners failed to discuss decisions from the district courts of the Second Circuit which clearly show the burdens are the same. See, e.g., Metropolitan Prop. &

Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 889 (D. Conn. 1991) (joinder may be fraudulent where "'no factual basis exists for an honest belief on the part of plaintiff that there is liability'", quoting Quinn v. Post, 262 F. Supp. 598 (S.D.N.Y. 1967)); Fahnestock & Co. v. Castelazo, 741 F. Supp. 72, 74 (S.D.N.Y. 1990) (citing Green v. Amerada Hess, 707 F.2d 201 (5th Cir. 1983), among other cases, for proposition that "defendants must show bad faith with sufficient certainty that there is no 'reasonable basis for predicting that state law might impose liability on the non-diverse defendant.'"); American Mutual Liab. Ins. Co. v. Flintkote Co., 565 F. Supp. 843, 845 (S.D.N.Y. 1983) ("the stringent test for fraudulent joinder has uniformly been at least whether

there is any reasonable basis for predicting that state law might impose liability on the non-diverse defendant," and citing B., Inc. v. Miller Brewery Co., 663 F.2d 545 (5th Cir. 1981), among others, for the proposition that "[o]ther courts have expressed the evidentiary test [for fraudulent joinder] in equally exacting terms").

B. The Lower Courts Properly Decided this Case Belonged in Federal Court

No questions of importance are raised by petitioners' attempt to re-argue the District Courts' decisions concerning whether this case should be remanded. (P41-48). Petitioners advance various theories concerning corporate veil-piercing, alter ego and agency (see id.) in support of their argument that joinder of certain of the

defendants was not fraudulent. They also argue that they were denied discovery with respect to these jurisdictional issues. (See id. at 14, 45-47).[11] Such arguments are advanced

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[11] Petitioners' contention that the courts below were required to permit discovery with respect to in personam jurisdictional issues overlooks the incontrovertible fact that discovery was abandoned by petitioners when faced with a motion for a protective order. Although a court "must bear in mind what procedural protections could be required to assure that a full airing of the facts pertinent to a decision on the jurisdictional question may be given to all parties," Herbert v. National Academy of Sciences, 974 F.2d 192, 198 (D.D.C. 1992), a court may deny a plaintiff an opportunity to engage in such discovery where, as here, the plaintiffs chose to waive their opportunity for discovery and their jurisdictional claims are frivolous. Singletary v. B.R.X., Inc., 828 F.2d 1135, 1137-38 (5th Cir. 1987) (plaintiff failed to appeal order of magistrate limiting scope of discovery, failed to use ten additional interrogatories and failed to present issue of

(continued...)

in an attempt to raise issues for this Court where none exist.

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[11](...continued)
incomplete answer to district court); Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982) (frivolous jurisdictional claims); Washington v. Norton Mfg., Inc., 588 F.2d 441, 447 (5th Cir.), cert. denied, 442 U.S. 942 (1979).

The record establishes that petitioners waived their right to seek discovery on jurisdictional issues by failing to respond to Union Carbide's motion for a protective order. (JA639-702). The motion was made when the Bi plaintiffs sought discovery from Union Carbide on jurisdictional issues, among others (JA696-702). Their failure was a concession that their discovery demands were frivolous and an unjustified waste of the District Court's and the litigants' time and expense. Moreover, petitioners' claim rings hollow in light of the Wahid plaintiffs' voluntary dismissal of their claims against UCIL (deemed by Wahid counsel to be a "responsible act" (JA6278-79)) because their attorneys had concluded they were "incorrect" in their claim that UCIL was subject to the in personam jurisdiction of the Texas state court. (Id.)

It is implicit in Judge Fisher's orders dismissing the Enserch defendants and denying the Bi plaintiffs' motion to remand that petitioners fraudulently pled a cause of action against Enserch and H&G-Texas and that petitioners fraudulently pled jurisdictional facts against UCE, UCIL, H&G-London and H&G-India. Judge Keenan's decision denying the Wahid remand motion also confirms that the defendants amply demonstrated fraudulent joinder.

It is also incorrect for petitioners to suggest that a factual record had not been developed by the defendants. (P14, 45-47). UCIL, UCE, H&G-London and H&G-India all submitted detailed, competent and uncontroverted evidence in the form of sworn affidavits concerning their lack of

Texas contacts. (JA6237-68). In contrast, petitioners wholly failed to set forth any facts to support their allegations that these defendants were subject to the in personam jurisdiction of the Texas state court. In addition, Enserch and H&G Texas, the in-state defendants, demonstrated through uncontroverted affidavits that there was no possibility that a valid cause of action could be asserted against them. (JA6248-56).

Apart from the issue of fraudulent joinder, the alien citizenship of UCIL, UCE, H&G-London and H&G-India was properly disregarded as personal jurisdiction over these defendants was lacking. See Nu-Way Sys. v. Belmont Mktg., Inc., 635 F.2d 617, 621 (7th Cir. 1980).

With respect to petitioners' contention that UCIL was subject to in personam jurisdiction because it was doing continuous and systematic business in the State of Texas through its parent, Union Carbide, they have not offered a single fact in support. (See P42-48). It is well established that "the mere existence of a parent-subsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent." Hargrave v. Fibreboard Corp., 710 F.2d 1154, 1159 (5th Cir. 1983). Such exercise of jurisdiction is only warranted when "the parent corporation exerts such domination and control . . . 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of

jurisdiction.'" Id. (quoting J. Moore & J. Lucas, Moore's Federal Practice ¶ 4.25[6], at 4-272 (2d ed. 1982)). Once again, petitioners have completely failed to offer any facts in support. Rather, they incorrectly allege that they were "denied discovery" on the issue (P45-47), when, in fact, they have clearly waived their right to it.

C. There Is No Conflict Concerning the Futility Exception to 28 U.S.C. § 1447(c)

This Court recognized the "futility exception" to section 1447(c) in International Primate Protection League v. Administrators of Tulane Educational Fund, 111 S. Ct. 1700, 1710 (1991), noting that dismissal rather than remand is appropriate where a court is "certain" that remand pursuant to 28 U.S.C. section 1447(c) would prove futile. There, the futility

question arose when this Court concluded that the National Institutes of Health lacked authority to remove to federal court the petitioners' suit seeking an injunction against experimentation on monkeys. This Court, however, refused to dismiss the case because of "uncertainties that a remand would be futile." Id. at 1710.

The futility exception was first recognized in Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, 876 F.2d 1051 (1st Cir. 1989) ("M.A.I.N."). The M.A.I.N. court held that "we are unwilling to read . . . discretion into the statute, here, because we cannot say with absolute certainty that remand would prove futile." Id. at 1054.

Subsequently, in Bell v. City of Kellogg, 922 F.2d 1418 (9th Cir. 1991), the Ninth Circuit applied M.A.I.N.'s futility exception. The court stated that "[w]here the remand to state court would be futile . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources." Id. at 1424-25. The court found that remanding the case would be futile because the plaintiff's claim would be dismissed by the state court for failure to comply with the election law's bond posting requirement. See also Awbrey v. Jackson Band of Miwuk Indians, No. CIV. S-93-820-WBSJFM, 1993 WL 287405 (E.D. Cal. July 27, 1993) (futility exception recognized).

Subsequent to International Primate, the Second Circuit, in Mignogna v. Sair Aviation, Inc., 937 F.2d 37, 41 (2d Cir. 1991), recognized that "remand might be improper if it would be futile, as it would be if the state court could not exercise jurisdiction over [the plaintiff's] claim against [one of the defendants]." (citation omitted). The court then applied the "certainty" standard set forth in M.A.I.N. and International Primate and reversed the district court's dismissal of the case because it was not certain whether the plaintiff's tort claims against a "nonappropriated fund instrumentality of the United States," could be heard in state court. Id. at 42-43.

Several other circuits have also recently relied upon M.A.I.N. and

International Primate. Their holdings do not present a conflict with respect to invocation of the futility doctrine in this case. See Hexamer v. Foreness, 981 F.2d 821, 824 (5th Cir. 1993) (implicit in court's holding was recognition that domestic relations/garnishment action was the type of case which could proceed in state court).

Thus, the federal courts uniformly recognize that when a case is removed from state court to federal court, and the federal court determines that it lacks subject matter jurisdiction to hear the case, the federal court should remand, rather than dismiss the case pursuant to 28 U.S.C. § 1447(c), unless, as here, the court is "absolutely certain" that a remand to

state court would prove pointless or futile.

D. The Court Below Properly Applied the Futility Exception

The Second Circuit properly decided it would be futile to remand this case because the plaintiffs lacked standing to prosecute their action in state court. As the court stated, "[t]he question whether courts in our federal system must respect an act of a foreign country that purports to deprive the victims of a mass tort of standing to sue in our courts is a question of federal common law binding on state and federal courts alike." (A45).

This Court has made similar pronouncements. In Sabbatino, this Court noted:

> [w]hatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

376 U.S. at 424. See also First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611 (1983); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1987); Republic of Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986), cert. denied, 481 U.S. 1048 (1987); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 53 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966).

In light of this mandate, the Second Circuit concluded in this case

that "[b]ecause the Texas state courts, applying federal common law, would be obliged to reach the same conclusion regarding appellants' lack of standing that we have reached, a remand would be pointless." (A46). Thus, this is a paradigm case where futility, as recognized in International Primate, was properly invoked.

POINT III

EVEN IF PETITIONERS HAD STANDING, THE DISTRICT COURT CORRECTLY CONCLUDED THAT THEIR CLAIMS WERE BARRED ON COLLATERAL ESTOPPEL GROUNDS

Petitioners ask this Court to address the question of whether a "federal court should, in a diversity case, apply state forum non conveniens law where the application of federal forum non conveniens law would make a difference in the outcome." (Pxi). Petitioners are collaterally estopped

from raising this issue, previously addressed and decided against them under the federal common law doctrine in MDL 626. This Court previously denied petitions for writs of certiorari to address that determination. See Brief in Opp. at 1.

The doctrine of collateral estoppel prohibits a party from litigating any issue that has already been litigated in a prior proceeding by the same parties or their privies.[12]

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[12] Clearly, petitioners were parties to or in privity with the parties in the previously dismissed action as the doctrine of privity is applied liberally in the preclusive context. Alpert's Newspaper Delivery, Inc. v. New York Times Co., 876 F.2d 266, 270 (2d Cir. 1989). Petitioners blatantly attempt to re-litigate the same claims in the face of unrefuted evidence presented by Union Carbide that these same petitioners had filed claims in MDL 626. (JA6070-6122, 6123-6133). Moreover, the UOI, pursuant to the Bhopal Act,

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Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-27 (1979). The petitioners continue to seek to undermine the rationale behind the collateral estoppel doctrine by attempting to re-litigate the forum non conveniens issue, which was previously resolved by the District Court in its May 12, 1986 Opinion and Order. (JA5795-5857). When presented with petitioners' request that they be afforded yet another opportunity to pursue settled claims, the District Court found the requisite elements to be present. (A13-18).

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[12](...continued)
claimed itself to be the exclusive representative of and filed suit on behalf of all the Bhopal claimants in the District Court. Each and every person with claims was represented by the UOI and is bound by the dismissal of the UOI's complaint in MDL 626.

It is clear that a prior determination has collateral estoppel effect upon subsequent actions if there is identity of issues, the issue was actually litigated in the prior action, and its determination was a critical and necessary part of the earlier judgment. See Hicks v. Quaker Oats Co., 662 F.2d 1158, 1166 (5th Cir. Unit A Dec. 1981).

All elements were satisfied here.[13] In the original action, In re

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[13] Petitioners suggest that Judge Fisher's orders granting motions to remand in Soni v. Union Carbide Corporation, ("Soni") raise a bar to litigation of the fraudulent joinder issue (A65-66, 67-68). Collateral estoppel does not control resolution of the fraudulent joinder issue because Judge Fisher's Soni orders, unlike Judge Keenan's order in MDL 626, failed to satisfy the requirements for the application of collateral estoppel. It does not apply where, as in Soni, the "judgment relied upon as a basis for

(continued...)

Union Carbide, 634 F. Supp. 842 (S.D.N.Y. 1986), as here, the issue before the court was whether the United States was a convenient forum to entertain the litigation that arose in the aftermath of the Bhopal tragedy. Petitioners pled no new facts below that would have resulted in a different forum non conveniens analysis and the District Court held, "[d]espite plaintiffs' arguments, both the analysis of the forum non conveniens factors and the result of that analysis

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[13](...continued)
the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." Parklane, 439 U.S. at 330. In all actions subsequent to Soni, including Pandey, a case also initially before Judge Fisher, where fraudulent joinder allegations were raised by defendants as a basis for the federal court's exercise of jurisdiction, motions to remand were denied. (JA6750-53).

are the same today as in 1986." (A15).[14] Thus, re-visiting the forum non conveniens issue would have required the repetition of a legal inquiry identical to one it had already performed.

Second, the forum non conveniens issue was "actually decided" in the original action. The District Court issued a sixty-three page opinion after three months of discovery on the issues

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[14] In an attempt to re-litigate the balance of private interest factors, petitioners belatedly offered the District Court various stipulations and conclusory hearsay affidavits. (A69-98, 99-134, 135-138). Petitioners could have offered the stipulations in MDL 626 but failed to do so, thus distinguishing this case from those cited in the petition. (P64-65 n.30). No case cited even suggests that the introduction of a stipulation compels the re-opening of issues already fully litigated. If petitioners' argument were taken to its logical conclusion, no litigation would ever end.

raised by the motion to dismiss, the submission to the District Court of answering, reply and supplemental briefs, and a full day of oral argument. Finally, the issue was a necessary and essential part of the judgment below as forum non conveniens was the sole ground for dismissal. In re Union Carbide, 809 F.2d at 198 n.1.

The collateral estoppel doctrine's preclusive effect has been consistently invoked where, as here, litigants have attempted to avoid the effect of a federal court's forum non conveniens dismissal by commencing litigation in another court. See Villar v. Crowley Maritime Corp., 990 F.2d 1489 (5th Cir. 1989) (based on two prior forum non conveniens dismissals in California, and in absence of demonstration of change in objective facts materially

altering prior analysis, plaintiffs barred from re-litigating), reh'g en banc denied, Nos. 92-7162, 93-7036 (June 30, 1993); Fitzgerald v. Texaco, Inc., 521 F.2d 448 (2d Cir. 1975) (to same effect), cert. denied, 423 U.S. 1052 (1976).[15]

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[15] Petitioners raise the question of, when a federal court determines it is going to decline jurisdiction on forum non conveniens grounds, it should remand to state court rather than dismiss the action. (P48-51). First, this question is not presented given the collateral estoppel effect of the prior dismissal. Second, the cases cited by petitioners do not demonstrate a conflict. Certain of the cases in which dismissal was held to be improper were decided before Congress enacted 28 U.S.C. § 1404(a). Moreover, in none of the cases cited was the alternative forum a foreign court. It is elementary that "28 U.S.C. § 1404(a) . . . did not diminish the power of the federal courts to dismiss cases that should have been brought in foreign forums." Harrison v. Capivary, Inc. 334 F. Supp. 1141, 1142 (E.D. Mo. 1971). See also

(continued...)

Moreover, the circuit courts of appeals agree that it is federal forum non conveniens law -- not state law -- that governs when a federal court considers the issue of the convenience

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[15](...continued)
Vanity Fair Mills v. T. Eaton Co., 234 F.2d at 645. Here, dismissal was proper because the most convenient alternative forum is a foreign court. See Nolan v. Boeing Co., 919 F.2d 1058, 1070 (5th Cir. 1990), cert. denied, 111 S. Ct. 1587 (1991). See also Villar, 990 F.2d at 1489; Torreblanca de Aguilar v. Boeing Co., 806 F. Supp. 139, 144-45 (E.D. Tex. 1992).

Finally, Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), is inapposite. Carnegie was a federal question case removed from state court. All federal claims were dismissed, thus eliminating any basis for subject matter jurisdiction over the pendent state claims. This Court held that the district court had discretion to remand because remand to state court would best promote the values of economy, convenience, fairness and comity. None of these considerations is present here. See supra, Point II, C.

of a particular forum in a diversity action. In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), vacated on other grounds sub nom., Pan Am World Airways Inc. v. Lopez, 490 U.S. 1032, aff'd in relevant part and vacated in part, 883 F.2d 17 (5th Cir. 1989); Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1219 (11th Cir.) (per curiam), cert. denied, 474 U.S. 948 (1985); Royal Bed and Spring Co. v. Famossul Industria, 906 F.2d 45, 50 (1st Cir. 1990).

Petitioners have distorted the holding in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), hoping to create the appearance of a conflict among the courts with respect to this issue. Petitioners assert that the Second Circuit in Weiss held that a federal

court sitting in diversity, after a case has been removed from state court, must, in determining the forum non conveniens issue, apply state forum non conveniens law if the outcome would be different had the court applied federal forum non conveniens law. (P60). To the contrary, the Weiss court simply held it would look to New York state law for guidance on the issue of its supervision over a foreign corporation's "internal affairs." Petitioners also ignore subsequent Second Circuit cases which have narrowed Weiss. See, e.g., Gilbert v. Gulf Oil Corp., 153 F.2d 883 (2d Cir. 1946), rev'd on other grounds, 330 U.S. 501 (1947) (applying federal common law to forum non conveniens analysis).

In the absence of a conflict in the law, petitioners argue in the

alternative that under Erie v. Tompkins, Texas law applies because at the time respondents moved for dismissal, Texas law as construed in Dow Chemical Co. v. Alfaro, 786 S.W.2d. 674 (Tex. 1990), would have prevented a dismissal, thus giving rise to a "different outcome".[16] (P59-60). Petitioners' argument is beside the point.[17]

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[16] The Texas Legislature has acted to narrow the scope of section 71.031, as construed in Alfaro. An amendment to section 71.031 will permit state court judges in Texas to circumscribe unfettered access by foreigners and citizens of other states to Texas courts, endowing them with discretion to consider forum non conveniens factors. See Ch. 71, Civ. Prac. and Rem. Code, Subchapter D, 1993 Tex. Sess. Law Serv. 11 (Vernon).

[17] Even if Alfaro is controlling -- which it is not -- the narrow Alfaro holding is inapplicable here because the holding refers solely to cases brought under section 71.031 of the

(continued...)

The raison d'etre of the forum non conveniens doctrine is that a court may resist imposition on its jurisdiction even when jurisdiction is authorized by the letter of the venue statute. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). It is thus clear that application of the federal common law doctrine of forum non conveniens in diversity cases does not "operate as a state substantive rule of law and thus [fails to] transgress Erie's

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[17](...continued)
Texas Civil Practice and Remedies Code. Section 71.031 provides that the action must be brought within the applicable statute of limitations period, which petitioners have failed to do. (JA6198-99). Thus, neither section 71.031 nor the holding in Alfaro applies. In view of this bar, the lack of equal treaty rights between the United States and India, yet another obstacle to the applicability of section 71.031, need not be addressed.

constitutional prohibition." Sibaja, 757 F.2d at 1219 (footnote omitted). The rationale for applying federal law to forum non conveniens motions is that Erie v. Tompkins is not implicated because "[t]he forum non conveniens doctrine is a rule of venue, not a rule of decision." Id. See generally 15 Charles A. Wright, et al., Federal Practice and Procedure, § 3828, at 294 ("it seems quite clear" that state notions of forum non conveniens should not be binding on a federal court in a diversity action).

Finally, petitioners' argument that federal courts are abusing the forum non conveniens doctrine to sanction outcome-determinative, reverse-forum shopping by defendants (P20), ignores this Court's directive that courts should not consider

defendants' "reverse forum shopping" in their analysis of the private interest factors and this Court's explicit recognition of the necessity for the doctrine given the overburdened federal judiciary and the attractiveness of American courts to foreign plaintiffs. See Piper v. Reyno, 454 U.S. 235, 252 n.18, 253 (1981).[18] Moreover,

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[18] Petitioners misrepresent the Court's holdings in Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) and Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1984). Neither holding addressed the issue of choice of forum non conveniens law. The Chick Kam Choo Court simply held that because a pre-emption question was not addressed in a prior federal proceeding, the exception to the Anti-Injunction Act did not apply and therefore the pre-emption question had to be decided by Texas state courts. Pennzoil simply held that Younger abstention required that the lower courts defer decision on federal constitutional claims because the Texas courts should have been given an opportunity to adjudicate those claims.

petitioners' citation to cases as "illustrative" of the lower court's abuse of the forum non conveniens doctrine is misleading. (P21-22, n.5). In each instance, the lower courts conducted a fact-specific analysis in accordance with this Court's guiding precedents and, in cases where review was sought, this Court denied certiorari.[19]

Finally, it is clear that the forum non conveniens doctrine was not abused in this case. As the Second Circuit stated in affirming the prior forum non conveniens dismissal of these

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[19] Petitioners' cases are essentially a list of cases in which federal courts have rejected petitioners' counsel's forum non conveniens arguments. See, e.g., McClelland Engineers, Inc. v. Munusamy, 784 F.2d 1313, 1317 (5th Cir. 1986) (Fifth Circuit reversed lower court for failure to follow this Court's forum non conveniens precedents).

same petitioners' claims, "it might reasonably be concluded that it would have been an abuse of discretion to deny a forum non conveniens dismissal." In re Union Carbide, 809 F.2d at 202.

CONCLUSION

The decision of the Second Circuit Court of Appeals was fully consistent with established legal principles. Review is unwarranted.

Dated: New York, New York
August 11, 1993

Respectfully submitted,

Bud G. Holman
Counsel of Record for
Respondent
Union Carbide
Chemicals and
Plastics Company Inc.
101 Park Avenue
New York, NY 10178
(212) 808-7800

Of Counsel:
Lisa E. Cleary
Kelley Drye & Warren